

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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FRANCISCO RODRIGUEZ and ARISTIDES  
ALFREDO DILLATORO,

Civil Case No.: 2:16-cv-00254  
(DRH)(AKT)

Plaintiffs,

- against -

RIDGE PIZZA INC. d/b/a ALFREDO'S PIZZERIA,  
DENNIS DONOFRIO, and VELIA DONOFRIO,

Defendants.  
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**DEFENDANTS' MEMORANDUM OF LAW IN  
OPPOSITION TO MOTION TO AMEND**

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Attorneys for Defendants  
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## STATEMENT OF THE CASE

### PROCEDURAL HISTORY

This is an action arising out of claimed violations of the Federal Fair Labor Standards Act (“FLSA”) and the New York State Labor Law (“Labor Law”) relating, inter alia, to overtime rate of pay and wage disclosures. The action was commenced by filing and service of a complaint. The defendants named in the original complaint appeared and answered, denying the material allegations of the complaint. The parties thereafter engaged in paper discovery. Interrogatories and document demands were produced by both sides and responses provided. The discovery provided by defendants included both wage documentation as well as daily time cards evidencing plaintiffs’ hours of work. These hours when combined with the plaintiffs’ pay rate and plaintiffs’ answers to interrogatories regarding the total compensation received negatives any overtime claim. Specifically, the amount of compensation concededly received by plaintiffs matches almost exactly what the time cards and the hourly rates reflect as the proper amounts.

Plaintiffs thereafter requested from Hon. Denis R. Hurley, the District Court Judge on this matter, a pre-motion conference with respect to a proposed amended complaint. This Court, by electronic order dated May 15, 2017 directed that the motion be made before the Court, not the District Court Judge and set a briefing schedule for the motion. Plaintiffs have now moved for leave to file an amended complaint, as attached to the moving papers.

### STATEMENT OF FACTS

The proposed amended complaint proposes changes in three areas. First, it seeks to amend the name of plaintiffs’ corporate employer to correctly reflect the name. Second, it seeks to amend the identity of an individual defendant by deleting Velia Donofrio and adding Philip

Donofrio. Third, it seeks to substantially change the factual allegations as to plaintiffs' employment.

Plaintiffs originally named an entity entitled "Ridge Pizza, Inc." as plaintiffs' employer. Defendants have provided plaintiffs in discovery with the proper name of their corporate employer – Ridge Restaurant, Inc. No objection is made to this amendment

The original complaint named Velia Donofrio, the mother of defendant Dennis Donofrio, as an individual defendant. Plaintiffs alleged that Velia Donofrio owned and operated plaintiffs' corporate employer and had the power to hire and fire, controlled the schedules and working conditions, and maintained employment records, all such to make her an "employer" (Old ¶20-24, all "Old" references are to the original complaint). In fact, Velia Donofrio had no such connections with plaintiffs' corporate employer. By the instant application, plaintiffs seek to discontinue against Velia Donofrio and substitute therefore Philip Donofrio, another son of Velia Donofrio (New ¶19-22, all "New" references are to the proposed amended complaint).

The proposed amended complaint seeks to make substantial changes in the factual allegations underlying the claims. These changes fall into three categories: those affecting plaintiff Rodriguez, those affecting plaintiff Dillatoro, and those affecting both plaintiffs.

Specifically, the amended complaint proposes to make changes as to plaintiff Rodriguez as follows: (a) the dates and length of plaintiff's employment from five months in 2014 to six months in both 2014 and 2015 (Old ¶39, New ¶24, (b) the regular rate of pay for plaintiff at \$9 per hour was deleted and not replaced with anything (Old ¶40, no New ¶), (c) plaintiff's allegation that he failed to receive pay for overtime hours to a failure to receive any overtime pay (Old ¶45, New ¶29, 30), (d) plaintiff's allegation that he never received a wage statement or



notice to an allegation that he never received a statement or notice meeting certain statutory requirements (Old ¶48, 49, New ¶32, 33).

Specifically, the amended complaint proposes to make changes as to plaintiff Dillatoro as follows: (a) the regular rates of pay for plaintiff to \$9 per hour was deleted and not replaced with anything (Old ¶51, no New ¶), (b) plaintiff's allegation that he would arrive and punch in before 10:00 a.m. and not receive pay for such period was deleted and replaced with nothing (Old ¶55, no New ¶), (c) plaintiff's allegation that he failed to receive pay for overtime hours to a failure to receive any overtime pay (Old ¶57, New ¶39).

The amended complaint proposes to make amendments to allegations concerning both plaintiffs as follows: (a) periodic pay penalties for late "punch outs" and late arrivals were deleted and not replaced with any allegation (Old ¶63, no New ¶), (b) all allegations as to the applicable law were deleted (Old ¶26-38).

#### THE APPLICABLE STANDARD

Federal Rules of Civil Procedure Rule 15 governs amendments to pleadings not of right and provides, in relevant part that "the Court should freely give leave when justice requires". However, the ability to amend not as of right is not unlimited. The determination to grant leave is within the sound discretion of the Court and should not be granted where there is an apparent or declared reason such as undue delay, bad faith, dilatory motive, undue prejudice, futility, lack of merit, etc. Foman v. Davis, 371 U.S. 178, 83 S. Ct. 227, 9 LEd.2 222 (1962). Ruffolo v. Oppenheimer & Co., 987 F.2d 129 (2d. Cir., 1993). Application of this standard to the facts compels denial of the motion as set forth, infra.

ARGUMENT

POINT I

SINCE THE PROPOSED AMENDMENT  
FAILS TO MEET THE REQUIREMENTS  
OF FRCP 15, THE MOTION SHOULD BE DENIED

Defendants submit that the proposed amended complaint should not be permitted since justice does not so require. As a result, the motion to amend should be denied, except as to the correct name of the corporate defendant.

As set forth, supra, the proposed amendments fall into three categories: (1) amendment of the name of the corporate defendant, (2) substitution of a new individual defendant for one of the individual defendants, and (3) substantive changes. The second and third categories are not appropriate for amendment, as set forth, infra.

A. THE INDIVIDUAL DEFENDANT

There is no basis for the substitution of Philip Donofrio for Velia Donofrio as an individual defendant. Thus, the proposed amendment lacks merit and should be denied.

As set forth in defendants' discovery responses, defendant Dennis Donofrio was the individual who made hiring and firing decisions, controlled hours and conditions, and maintained records. Assuming, arguendo, Philip Donofrio had been involved in the operation of plaintiffs' corporate employer as is now alleged in the proposed amended complaint, plaintiffs were in possession of such knowledge at the inception of the action. Thus, there is no reason why Philip Donofrio could not have been and was not originally named as a defendant. For reasons known only to plaintiffs at this juncture, Velia Donofrio was named instead, evidencing both an intent to delay as well as bad faith. The assertion in plaintiffs' brief that plaintiffs believed that Velia was Philip's name as justification for the amendment is patently insufficient to warrant amendment

for three reasons. First, such an assertion is entirely unsupported by any declaration of plaintiffs. Second, the assertion is patently unworthy of belief as Velia is a female name and Philip is a masculine name. No basis for plaintiffs' asserted belief is set forth. Surely, if Philip Donofrio were involved with the business plaintiffs would have referred to him by such name and he would have been named originally. Finally, no explanation is given for how plaintiffs years later came to the realization that Velia Donofrio and Philip Donofrio were not the same person. It certainly appears that no due diligence was done at the inception of this action to ascertain the identity of the proper defendants. Thus, there is no basis for the proposed amendment.

#### B. THE SUBSTANTIVE CHANGES

The substantive changes proposed in the amended complaint are both numerous and extensive. The only conclusion which can be drawn for such proposed amendments is that when confronted with documentary evidence concerning their employment, plaintiffs are seeking to salvage their meritless case by changing their pleadings and, therefore, stories. This is the height of bad faith and should not be permitted.

The proposed amendment changes (a) the length and identity of the period of plaintiffs' employment, (b) the alleged rates of pay, (c) the nature of the overtime claims for a shortage to total, (d) the nature of the claimed failures to provide wage statements from total to non-compliant. Moreover, when confronted with the timecards utilized by defendants to record plaintiffs' hours, plaintiffs are now attempting to assert a claim that their hours were other than as shown on the time cards. At the same time plaintiffs are attempting to abandon their claims that they were "penalized" for late "punch ins" and "punch outs". Similarly, when confronted with wage documents, plaintiffs are now attempting to distance themselves from their prior denials.



The cumulative effect of all of these changes evidences bad faith and is prejudicial to defendants as it substantially changes the alleged facts and legal theories arising therefrom. Thus, there is no basis for the proposed amendment. As a result, the motion should be denied.

CONCLUSION

The proposed changes to the individual defendants and substantive theory of the case are made in bad faith and are prejudicial to defendants, (except as to Velia Donofrio who never was properly in the case). Plaintiffs should not be given leave to serve and file the amended complaint except as to the corporate defendant.

Dated: June 12, 2017  
Mattituck, New York

Respectfully submitted,  
Wickham, Bressler & Geasa, P.C.



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Eric J. Bressler

*Ejb/clt/Donofrio/MOL oppose amend*

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**AFFIDAVIT OF SERVICE**

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Defendants.  
-----X

STATE OF NEW YORK     )  
                                      )ss.:  
COUNTY OF SUFFOLK    )

Erin R. Macari, being duly sworn, deposes and says:

1. I am not a party to the action. I am over 18 years of age and I reside at Mattituck, New York. I am employed by Wickham, Bressler & Geasa, P.C.
2. On June 13, 2017, I served a true copy of the within DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO AMEND by electronic mail properly addressed to the following:

Steven J. Moser, Esq.  
Moser Employment Law Firm, P.C.  
3 School Street, Suite 207B  
Glen Cove, New York 11542  
Email: smoser@moseremploymentlaw.com

  
ERIN R. MACARI

Sworn to before me this  
16<sup>th</sup> day of June, 2017.

  
\_\_\_\_\_  
Notary Public

Cheryl Simons  
Notary Public, State Of New York  
No. 31-4970341  
Qualified In Suffolk County  
Commission Expires February 4, 2019